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91-437

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

TYRONE M. SMALLS,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR WRIT OF CERTIORARI

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September 1991

QUESTION PRESENTED

Whether petitioner's constitutional right against self-incrimination was violated by prosecuting him for failing to obey a general regulation that required him, under penalty of criminal prosecution, to produce proof of possession or lawful disposition of certain tax-exempt items.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Tyrone M. Smalls, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on June 21, 1991.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 32 M.J. 398 (C.M.A. 1991), in which Judge Cox concurred and Senior Judge Everett dissented (Appendix A). The United States Air Force Court of Military Review issued a decision on March 16, 1990, reported at 30 M.J. 666 (A.F.C.M.R. 1990) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on June 21, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. 1989) and 10 U.S.C. § 867a (Supp. 1989).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . . .

STATEMENT OF THE CASE

On April 11, 1989, the petitioner, an Air Force Sergeant (E-4), was tried by a general court-martial in a judge alone trial at Clark Air Base, Republic of the Philippines. He pled guilty to charges of disobeying a general regulation by wrongfully failing to show possession or authorized disposition of tax-exempt personal property and of wrongfully disposing of his family's passports in violation of 18 U.S.C. § 1544. He was originally sentenced to a dishonorable discharge, confinement for four months, forfeiture of $200.00 pay per month for four months, and a reduction to airman basic (E-1). The Air Force Court of Military Review modified the findings and reduced the length of his confinement and forfeitures to three months each. The United States Court of Military Appeals affirmed the findings of the Air Force Court.

United States Commander-in-Chief of the Pacific, Republic of the Philippines, Instruction (USCINCPACREP-PHILINST) 4066.7R, 4 April 1986, paragraphs 2r and 3h, prohibits military members and other U.S. government employees and sponsorees stationed in the Philippines from failing to show possession or authorized disposition of certain tax-exempt property when directed to

do so by proper authorities (Extracted portions at Appendix C). There is no provision in the Instruction requiring any military member to keep appropriate records regarding tax-exempt property; servicemembers are simply required to account for the whereabouts of the property upon demand. Improperly disposing of the property or simply failing to answer questions about the location of the property can lead to criminal sanctions. On May 4, 1988, pursuant to an investigation into the disposition of certain tax-exempt vehicles by two other individuals, petitioner was asked to account for several tax-exempt items. Petitioner was able to account for, but not immediately produce, some of the items. At some point petitioner was read his rights under Article 31 of the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 831,[1] before being further questioned. Petitioner then requested counsel and refused to account for the remaining items. Petitioner was subsequently charged with and convicted, pursuant to his pleas, of disobeying the Instruction by failing to account for the items when requested to do so. Uniform Code of Military Justice, Article 92 (10 U.S.C. § 892(1)).[2]

---

[1] 10 U.S.C. § 831, Article 31, U.C.M.J., Compulsory self-incrimination prohibited:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial. . . .

[2] 10 U.S.C. § 892, Article 92, U.C.M.J., "Failure to obey order or regulation:

> Any person subject to this chapter who—
>
> (1) violates or fails to obey any lawful general order or regulation; . . . shall be punished as a court-martial may direct. . . ."

The Air Force Court of Military Review rejected petitioner's claim that the Instruction, known as a "show and tell" regulation, violated his privilege against self-incrimination. The Air Force Court found that the petitioner was not a suspect in a criminal investigation at the time of the "show and tell" and he was not asked any questions in violation of his Article 31, U.C.M.J., or Fifth Amendment rights. The court also found the military judge had no duty to advise the petitioner that he could raise a Fifth Amendment issue, therefore the guilty plea and the lack of objection or motion by the defense counsel waived the issue. *United States v. Smalls*, 30 M.J. 666, 668-669 (A.F.C.M.R. 1990). The Air Force Court modified the findings of the trial court by finding that the petitioner constructively possessed some of the items which he was charged with failing to show to the inspectors and dismissed those items from the Charge; the court reassessed the sentence accordingly. *Id.* at 670-671. The Court of Military Appeals affirmed the lower court and agreed that the petitioner had waived Fifth Amendment and Article 31, U.C.M.J., issues by not raising them at trial and by his plea of guilty. *United States v. Smalls*, 32 M.J. 398, 400 (C.M.A. 1991). Senior Judge Everett, in his dissent, stated he would find the "show and tell" regulation to be unconstitutional *per se* and would thereby reverse the conviction. *Id.* Neither court below, in their holdings, dealt with the issue of the underlying unconstitutionality of the Instruction, relying instead on an Article 31, U.C.M.J., analysis. The analyses differ and it is this basic unconstitutionality that petitioner now raises.

REASONS FOR GRANTING THE WRIT

The United States Commander-in-Chief of the Pacific, Republic of the Philippines, Instruction 4066.7R (CINCPACREPPHILINST 4066.7R), paragraphs 2r and 3h, hereinafter known as the "show and tell" regulation, is unconstitutional on its face in that it results in military members being ordered to incriminate themselves in

blackmarketing situations by requiring them to account for the possession or disposition of tax-exempt property; refusal to answer is itself a crime for which these service personnel can be prosecuted. The "show and tell" regulation involved in this case prohibits the following act: "Failure to show possession or authorized disposition of tax-exempt personal property when so directed by cognizant authorities." CINCPACREPPHILINST 4066.7R, paragraph 2r (Paragraph 3h provides the same prohibition but relates to automobiles only). The failure to comply with the above requirement "may result in disciplinary and/or adverse administrative actions." *Id.* at paragraph 2. Military members may be criminally prosecuted for failing to obey a lawful general order or regulation. Uniform Code of Military Justice (U.C.M.J.), Article 92, 10 U.S.C. § 892. Therefore, based on this "show and tell" regulation, a military member finds himself in a "Catch 22" situation in which he can be prosecuted either for having improperly disposed of tax-exempt items, for refusing to answer questions as to the location of those items, or simply for refusing to show, or even lacking the ability to show, possession of those items. In the case at bar, petitioner asserted his Fifth Amendment right not to incriminate himself and was subsequently prosecuted—not for having blackmarketed the tax-exempt items—but instead for asserting his privilege against self-incrimination. In fact, it appears from a witness statement contained in the Article 32 investigation (10 U.S.C. § 832),[3] that petitioner was advised by an investigator of his rights under Article 31, U.C.M.J. (10 U.S.C. § 931), that he was not required to make a statement. It was his invoking of this right for which he was held criminally liable in this case. Since refusing to answer questions regarding a possible criminal act results in criminal prosecutions, the "show and tell" regulation is

[3] An Article 32 investigation is the equivalent of a grand jury investigation or preliminary hearing to show sufficient evidence to proceed to trial.

clearly unconstitutional on its face in that it violates the protections afforded by the Fifth Amendment to the United States Constitution.

In *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), this Court held that suspected members of the Communist Party could not be compelled to complete a form that admits membership in the Party, thereby providing evidence toward a potential criminal prosecution. The forms were directed at suspected members, not to the public at large. Similar facts exist in cases involving the "show and tell" regulation. The military population at large stationed in the Philippines is not required to keep records of their tax-exempt purchases. They are not inspected regularly or even randomly to find out whether they are complying with the tax-exempt rules. They are only asked to "show and tell" if someone in authority finds something irregular in the records and wants to ascertain whether the individual can account for tax-exempt property. Therefore, the regulation is directed at those suspected of some form of wrongdoing, even if it has not risen to the level of a criminal investigation. This is precisely what occurred in *Albertson* that was found to violate the appellants' Fifth Amendment rights. In the case at bar, petitioner was singled out for a "show and tell" because records were found in the files of other military members indicating that they had sold cars to petitioner. No record of purchase of these vehicles was found in petitioner's file nor was there any record of him having registered either of those vehicles on the Air Force installation. Based on these facts, the inspectors at least had some suspicion that petitioner had possibly illegally disposed of those vehicles, prompting them to order a "show and tell." This order was not simply a matter of routine or random inspection of petitioner. He had been singled out because his file seemed suspicious.

The required records doctrine does not apply to petitioner because he was not required by the regulation to

keep any records. He was simply required to produce the tax-exempt items or properly account for their disposition. If he could not (or would not) account for the disposition of the items, whether they were blackmarketed or not (for instance, if an item is destroyed or lost, a military member could not "show" the item to the inspectors as required nor could he prove that he had properly disposed of the property), he violates the regulation. This is similar to the situation in *Marchetti v. United States*, 390 U.S. 39 (1968). The requirement that Marchetti provide information on his wagering business in the form of a registration requirement was "not significantly different from a demand that he provide oral testimony." *Id.* at 57. The same rationale applies in this case. The lack of production of tax-exempt items and the prosecution of a person who refuses to explain their whereabouts is simply a demand that a person provide oral testimony against himself. Such required information, as in *Marchetti*, violates the protections provided by the Fifth Amendment. As stated by the *Marchetti* Court, "[t]he constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it." *Id.* at 51.

In *Baltimore City Dept. of Social Services v. Bouknight*, 110 S.Ct. 900 (1990), this Court found that the Fifth Amendment's protection applies when "the act of complying with the government's demand testifies to the existence, possession, or authenticity of the things produced." *Id.* at 905. In other words, in such situations, the production of items demanded by the government is testimonial in nature. The request made of petitioner falls into this category, rather than that of "the contents or nature of the thing demanded." *Id.* Here, the question was whether the petitioner still *possessed* the tax-exempt

items. If he did not possess them, he was required to show proper disposition of the items. If he said nothing, he could not meet the requirements of the regulation and his silence became a failure to "show" or "tell." It is not the *content* of the personal property displayed to the authorities that matters, its the fact of whether the item is still in the possession of the person who is the subject of the investigation. Therefore, both the "show" *and* the "tell" portions of the regulation required petitioner to provide testimonial evidence that was potentially incriminating, on pain of being prosecuted either if the items were illegally disposed of or if he simply remained silent as to the location of the property. This instance violates both *Albertson* and *Marchetti.*

Since the "show and tell" portion of the regulation violates the Fifth Amendment, petitioner's conviction cannot stand in spite of the fact that he pled guilty to the offense. A person cannot be convicted of an act that is not criminal. If it is unconstitutional to require a person to incriminate himself by his silence, then the military member cannot be convicted of violating a lawful general regulation, since by definition the regulation is therefore not lawful. In both *Blackledge v. Perry*, 417 U.S. 21 (1974) and *Menna v. New York*, 423 U.S. 61 (1975), this Court held that a guilty plea does not preclude a defendant from challenging issues on appeal that result in the trial court's inability to try the person at all rather than concerning the procedural aspects of the trial. *Blackledge* at 31. This is petitioner's situation. He cannot be tried at all on this offense if to do what petitioner did is not a crime. He cannot plead guilty to an act that is not a criminal offense. Therefore, the court below is incorrect in holding that petitioner waived the error by pleading guilty to the alleged offense.

CONCLUSION

The "show and tell" portion of the regulation is unconstitutional *per se* since it requires military members to incriminate themselves or be criminally prosecuted based on their silence and assertion of the Fifth Amendment privilege. Such a regulation leaves military members in an untenable position. *See* Chief Judge Everett's dissent in *United States v. Williams*, 29 M.J. 112, 121 (1989), quoting the dissent of Judge Smith of the Army Court of Military Review (*United States v. Williams*, 27 M.J. 710, 729-30 (A.C.M.R. 1988)). This is an outright violation of a citizen's right to not be required to provide testimony against himself. Accordingly, petitioner contends review by this Court is warranted. Therefore, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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September 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 64,875

ACM 27842

UNITED STATES,

Appellee

v.

TYRONE M. SMALLS,
Sergeant U.S. Air Force,

Appellant

Submitted August 7, 1990

Decided June 21, 1991

Counsel

For Appellant: *Colonel Richard F. O'Hair and Captain Paul M. Dankovich.*

For Appellee: *Major Paul H. Blackwell.*

Military Judge: Lemuel R. Waitman.

Opinion

SULLIVAN, Chief Judge:

On April 14, 1989, appellant was tried by a general court-martial composed of a military judge sitting alone at Clark Air Base, Republic of the Philippines. Pursuant to his pleas, he was found guilty of one specification each of violating paragraphs 2r and 3h, Enclosure 6, USCINCPACREPPHILINST 4066.7R (April 4, 1986), in contravention of Article 92, Uniform Code of Military Justice, 10 USC 892. Also, pursuant to his pleas, he was found guilty of disposition of his family's passports con-

trary to 18 USC § 1544, a violation of Art. 134, UCMJ, 10 USC § 934. He was sentenced to a dishonorable discharge, confinement and forfeiture of $200 pay per month for 4 months, and reduction to E-1. The convening authority approved the sentence. On March 16, 1990, the Court of Military Review affirmed the findings of guilty with some modification. In reassessing the sentence, it reduced the term of confinement and the period of forfeitures to 3 months. 30 MJ 666.

On August 7, 1990, this Court granted review on the following question of law:

> WHETHER APPELLANT'S PROSECUTION, PREMISED UPON A VIOLATION OF USCINCPACREPPHILINST 4066.7R, AMOUNTED TO A "PENALTY" ON THE APPELLANT'S EXERCISE OF HIS FIFTH AMENDMENT AND ARTICLE 31 RIGHTS AGAINST SELF-INCRIMINATION.

We hold that the record of trial does not support a conclusion that appellant's rights under the Fifth Amendment or Article 31, UCMJ, 10 USC § 831, were violated. *See United States v. Williams*, 29 MJ 112 (CMA 1989). Moreover, his guilty pleas and his failure to raise these claims at a court-martial tried after publication of our decision in *United States v. Lee*, 25 MJ 457 (CMA 1988), waived any claims he may have had in this regard. *Cf. United States v. Hilton*, 27 MJ 323 (CMA 1989).

Appellant pleaded guilty to violating two so-called "show and tell" regulations.* He did so almost 14 months

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* 1. *Definitions.* The terms "tax-exempt property" and "tax-exempt motor vehicles," as used herein, refer to personal property or motor vehicles in the RP [Republic of the Philippines] upon which no RP import, excise, consumption, or other tax, duty, or import has been paid by reason of the exemption granted pursuant to reference (a). A "nontax-exempt person" is a person or other entity not entitled to a tax exemption under reference (a). All prohibitions relating to motor vehicles are equally applicable to the

after the decision of this Court in *United States v. Lee*, *supra*. Pursuant to these pleas, he stipulated to the following facts:

> 1. On 10 December 1987 through the present and at all pertinent times Sergeant Tyrone M. Smalls has been on active duty with the United States Air Force stationed at Clark Air Base, Republic of the Philippines, and assigned to the 3d Combat Support Group.
>
> 2. The Merchandise Control Activity, Commander of the 3rd Combat Support Group, designated Major Thomas A. Beckett as Merchandise Control Activity IAW USCINCPACREPPHILINST 4066.7R, enclosure 6, paragraph 9. Major Beckett, in turn, authorized TSgt Robert Frazier, to conduct show and tell operations on his behalf. TSgt Frazier was, therefore, "Cognizant Authority" for the purpose of USCINCPACREPPHILINST 4066.7R, enclosure 6, paragraph 2(r) and 3(h) when he conducted the show and tell of the accused's property on 4 May 1988.

---

major components of motor vehicles, i.e., engine, transmission, drive train, and chassis.

2. *Tax-Exempt Personal Property.* The following acts and practices relating to the acquisition, possession, and disposition of tax-exempt personal property are *prohibited* and violations may result in disciplinary and/or adverse administrative actions:

* * * *

> r. Failure to show possession or authorized disposition of tax-exempt personal property when so directed by cognizant authorities.

* * * *

3. *Tax-Exempt Motor Vehicles.* The following acts and practices relating to the acquisition, possession, and disposition of motor vehicle[s] are *prohibited*:

* * * *

> h. Failure to show possession or authorized disposition of tax-exempt motor vehicles when so directed by cognizant authorities.

3. On or about 4 May 1988, the accused violated USCINCPACREPPHILINST 4066.7R, enclosure 6, paragraph 2r, dated 4 April 1986, a lawful general regulation, by wrongfully failing to show possession or authorized disposition of the following tax-exempt personal property he owned when so directed by cognizant authorities to do so:

a. Stereo Systems consisting of:

(1) One Sanyo Amplifier (Prosecution Exhibit 2)

(2) One Sanyo Tuner (Prosecution Exhibit 2)

(3) One Sanyo Cassette Deck (Prosecution Exhibit 2)

(4) Two Sanyo Speakers (Prosecution Exhibit 2)

(5) One Fisher Amplifier (Prosecution Exhibit 3)

(6) One Toshiba Cassette Player/Recorder (Prosecution Exhibit 4)

b. Ladies Watch (Prosecution Exhibit 5)

c. Four Car tires (Prosecution Exhibit 6)

4. The accused, on or about 4 May 1988, also failed to show possession or authorized disposition of his 1984 Chevy Blazer and 1978 Toyota Celica in violation of USCINCPACREPPHILINST 4066.7R, enclosure 6, paragraph 3h, dated 4 April 1986, a lawful general regulation, when he was directed by cognizant authorities to do so (Prosecution Exhibits 7 and 8, respectfully [sic]).

The Court of Military Review in its opinion made additional comments concerning appellant's questioning by two command representatives:

On 4 May 1988, two merchandise control analysts conducted the "show and tell" at the appellant's quarters. The record of trial itself is silent as to why it was conducted. However, the Article 32 Investigation contains the summarized testimony of one of the analysts. He testified that a review of two other individuals' merchandise control records revealed that the appellant had purchased a vehicle from each one of them, but no documentation concerning the purchases was contained in the appellant's records. Security Police records indicated neither vehicle had been registered on base after purchase by the appellant. Therefore, a "show and tell" was deemed appropriate. It was conducted at a time prearranged through the appellant's first sergeant. The appellant was asked to account for all controlled items of property listed in his records, as well as the two vehicles in question. There is no affirmative indication anywhere in the allied papers that merchandise control officials suspected the appellant of being involved in blackmarketing at the time of the requested accounting.[4] Further, it appears that all the merchandise control officials did when they met with the appellant was ask him to account for the property. As soon as it was determined that he could not, on the spot, account for the vehicles and the other property now charged, the appellant terminated the meeting by indicating he wanted to confer with legal counsel.

[4] . . . The appellant here was at that time under investigation by the Air Force Office of Special Investigations with regard to unlawful disposition of passports, but that appears to have been an entirely separate matter.

30 MJ at 669.

The plea inquiry in this record does not in any way suggest that appellant was actually a suspect for his first sergeant at the time the latter questioned him or that he was asked questions which violated the Fifth

Amendment or Article 31. *United States v. Williams*, 29 MJ at 117; *cf. United States v. Jones*, 31 MJ 189, 191 (CMA 1990). The Court of Military Review did note some information presented at the Article 32, UCMJ, 10 USC § 832, investigation which could support an argument that appellant should reasonably have been considered a suspect by merchandise control officials at that time. *See United States v. Good*, 32 MJ 105 (CMA 1991); *but see United States v. Bethea*, 22 USCMA 223, 46 CMR 223 (1973). Nevertheless, that court did not find that appellant was a suspect on this basis, and appellant himself did not make such an argument at his trial which occurred long after the decision of this Court in *Lee*. In these circumstances, we agree with the court below that appellant waived this issue by failing to both fully develop the record and properly present such a claim to the military judge. *Cf. United States v. Hilton*, 27 MJ at 326.

The decision of the United States Air Force Court of Military Review is affirmed.

COX, Judge (concurring in the result):

I agree with Chief Judge Sullivan that the findings and sentence should be affirmed. However, I remain of the opinion that a servicemember may be prosecuted for failing to obey the "show and tell" regulation. *See* my separate opinions in *United States v. Jones*, 31 MJ 189, 194 (CMA 1990), and *United States v. Lee*, 25 MJ 457, 465 (CMA 1988).

EVERETT, Senior Judge (dissenting):

I would set aside the conviction because, in my view, the "show and tell" regulation on which the Government relied in prosecuting Smalls is unconstitutional. *See United States v. Williams*, 29 MJ 112, 120 (CMA 1989) (Everett, C.J., dissenting).

APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 27842

UNITED STATES

v.

SERGEANT TYRONE M. SMALLS, FR 202-50-9577,
United States Air Force

Sentence Adjudged 14 April 1989.

Decided 16 March 1990.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Captain Paul M. Dankovich.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Major Terry M. Petrie and Captain Morris D. Davis.

Before BLOMMERS, KASTL and MURDOCK, Appellate Military Judges.

DECISION

BLOMMERS, Senior Judge:

The appellant pleaded guilty, pursuant to a pretrial agreement, to two specifications of violating a merchandise control regulation by failing to account for various controlled items of property, including two motor vehicles, and to unlawful disposition of passports belonging to himself and his dependents in violation of Title 18, United States Code, Section 1544. Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. He was found guilty in accordance with his pleas, and sentenced by a military judge sitting

alone to a dishonorable discharge, four months confinement, forfeiture of $200.00 pay per month for four months, and reduction to airman basic (E-1). The convening authority approved the sentence. Before us, two errors are assigned. We find partial merit in the first assertion, but not on the ground raised by counsel.

I

THE APPELLANT'S PLEA WAS IMPROVIDENT TO CHARGE I AND THE SPECIFICATIONS THEREUNDER BECAUSE OF THE MILITARY JUDGE'S FAILURE TO ADVISE THE APPELLANT ABOUT THE DEFENSE AGAINST SELF-INCRIMINATION.

II

THE MILITARY JUDGE WAS IMPROPERLY PREDISPOSED TO ADJUDGE A PUNITIVE DISCHARGE.

I

A

The specifications under Charge I allege that the appellant violated provisions of USCINCPACREPPHILINST 4066.7R, *General Merchandise Control Regulations in the Republic of the Philippines*, dated 4 April 1986, by failing to produce or otherwise account for various controlled items of property when directed to do so by cognizant authorities, in this case representatives from the Clark Air Base merchandise control division.[1] The matter asserted as error is being raised for the first time on appeal. It is premised upon the recent challenge to the constitutionality of these so called "show and tell" provisions in overseas merchandise control regulations.

[1] The items of property listed in Specification 1 included two amplifiers, one tuner, one cassette deck, two speakers, one cassette player/recorder, one lady's watch, and four automobile tires. Specification 2 related to the two motor vehicles.

The appellant relies principally on the Army Court of Military Review's decision styled *United States v. Williams*, 27 M.J. 710 (A.C.M.R.1988). The decision actually addressed two cases, *United States v. Williams* and *United States v. Koh*. In *Koh*, the accused pleaded guilty to various offenses, including a specification alleging failure to account for proper disposition of various controlled items of property in violation of the terms of a general regulation. When asked to account for this property, Koh told a military police investigator that he had given some $5,000.00 worth of controlled goods to various Korean national relatives, none of whom could lawfully receive such property. His statement to the investigator was admitted at trial without objection. However, before entering his pleas, Koh did challenge the constitutionality of the regulation's accounting requirement.

The Army Court held that Koh had effectively raised the "substantive defense" afforded by the Fifth Amendment privilege against self-incrimination; that he had done so in a timely manner; and that his subsequent guilty plea did not waive the defense afforded by the privilege, citing *Haynes v. United States*, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968). The Court further concluded that the statement, coupled with facts elicited during the providence inquiry and a confessional stipulation, should have alerted the military judge to the possibility that the constitutional defense afforded by the Fifth Amendment might have been raised. The judge was therefore bound to advise Koh about the defense and obtain his affirmative waiver thereof. Absent such inquiry, the Court ruled, the guilty plea was improvident. 27 M.J. at 722-726. *See United States v. Jemmings*, 1 M.J. 414 (C.M.A. 1976).[2]

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[2] In *United States v. Williams*, the accused was likewise charged with failing to account for controlled items and pleaded guilty to committing that offense. No challenge to the constitutionality of the regulation's accounting requirement was raised at trial. The Court held that an accused may not assert the defense afforded by

The appellant argues the rationale in *Koh* is applicable in the instant case. If we accept the Army Court's rationale in *Williams/Koh*, the claim of error has no merit because no issue regarding the constitutionality of the regulatory accounting requirement was raised at trial. Since the matter was not raised, the military judge had no duty to advise the appellant of the defense available under the Fifth Amendment privilege. 1 M.J. at 418.

This does not entirely resolve the issue. Additional guidance regarding the constitutionality of overseas merchandise control accounting requirements has recently been provided by the United States Court of Military Appeals when it rendered its decision in the *Williams* case. *United States v. Williams*, 29 M.J. 112 (C.M.A. 1989).[3]

The Court of Military Appeals held that by applying a narrow construction to the regulatory disclosure provisions in such regulations, they are "not unconstitutional *per se* and . . . [do] not compel disclosures in violation of the Fifth Amendment or Article 31" of the UCMJ. *Id.* at 113. The Court reasoned:

> The operative language of this regulation [a merchandise control directive applicable to U.S. Forces personnel in Korea] requires a servicemember, upon request, to 'present valid and bona fide information or documentation showing the continued or lawful disposition . . . of' specified items. A limited construction of this language suggests that the servicemember must show physical possession of the item or must possess some type of documentation or other

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the Fifth Amendment privilege for the first time on appeal, citing *Garner v. United States*, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976). 27 M.J. at 718-719. Accordingly, Williams' pleas of guilty were provident and his conviction of this offense was affirmed.

[3] In response to a mandate from the Court of Military Appeals, we have also expressed our views regarding this issue in *United States v. Hilton*, 29 M.J. 1036 (A.F.C.M.R. 1990), *aff'd*, 30 M.J. 118 (C.M.A. 1990).

> papers showing lawful disposition if the item is no longer in his possession. . . . Different questions or additional questions [absent an Article 31 rights advisement] in combination with the original request to produce the item or documentation are not authorized.

Id. at 115. The Court based its holding on the "required records" doctrine as formulated by the United States Supreme Court. *See United States v. Hilton*, at 1043-44 for a discussion of the development of this doctrine. The Court of Military Appeals in *Williams* stated:

> Production of the item or the documents specified by regulation showing the proper disposition of the same would seem to fit squarely within the required records exception to the Fifth Amendment privilege.
>
> * * * *
>
> [W]e reject appellant's argument that his pleas were improvident and that the military judge should have recognized a potential Fifth Amendment or Article 31 defense in his case. Here, the evidence of record does not show that appellant was a suspect at the time of questioning or that he was asked questions which violated the Fifth Amendment or Article 31.

29 M.J. at 116-117.

The present case appears to fall within the ambit of the *Williams* holding. On 4 May 1988, two merchandise control analysts conducted the "show and tell" at the appellant's quarters. The record of trial itself is silent as to why it was conducted. However, the Article 32 Investigation contains the summarized testimony of one of the analysts. He testified that a review of two other individuals' merchandise control records revealed that the appellant had purchased a vehicle from each one of them, but no documentation concerning the purchases was contained in the appellant's records. Security Police records

indicated neither vehicle had been registered on base after purchase by the appellant. Therefore, a "show and tell" was deemed appropriate. It was conducted at a time prearranged through the appellant's first sergeant. The appellant was asked to account for all controlled items of property listed in his records, as well as the two vehicles in question. There is no affirmative indication anywhere in the allied papers that merchandise control officials suspected the appellant of being involved in black-marketing at the time of the requested accounting.[4] Further, it appears that all the merchandise control officials did when they met with the appellant was ask him to account for the property. As soon as it was determined that he could not, on the spot, account for the vehicles and the other property now charged, the appellant terminated the meeting by indicating he wanted to confer with legal counsel.

We find the circumstances present in this case sufficiently similar to those in *Williams* to conclude that the accounting provision of the regulation charged as being violated can be constitutionally applied to the appellant. There was no violation of the appellant's Fifth Amendment or Article 31, 10 U.S.C. § 831 rights. The military judge had no duty to advise the appellant about his rights under the privilege against self-incrimination. From this perspective then, the pleas of guilty to Charge I and its

---

[4] We do not believe the matter of whether or not an individual is a suspect is determinative in any event. Application of the required records doctrine is not dependent upon this factor. *Wilson v. United States*, 221 U.S. 361, 382, 31 S.Ct. 538, 55 L.Ed. 771 (1911). *See also Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948); *Davis v. United tates*, 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453 (1946); *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941); and cases cited in *Hilton* at 1044, n. 13. The appellant here was at that time under investigation by the Air Force Office of Special Investigations with regard to unlawful disposition of passports, but that appears to have been an entirely separate matter.

specifications were provident. We also believe this issue has been waived. 27 M.J. at 718-719. *See also United States v. Clark*, 28 M.J. 401 (C.M.A. 1989); *United States v. Hilton*, 26 M.J. 635 (A.F.C.M.R. 1988).[5]

B

On another basis, however, we hold that the findings of guilty as to all but one item of property listed under Specification 1 of Charge I cannot stand as there is no factual basis to support the appellant's plea R.C.M. 910(e). In short, the record does not establish he committed the offense charged. A portion of the appellant's unsworn statement accurately summarizes the state of the evidence as to the property listed in Specification 1:

> Lastly, Judge Waitman, I did fail to show and teli by not showing authorized disposition of the following items in Specification 1 of Charge I: Sanyo amplifier, tuner, cassette deck and speakers and Fisher amplifier. They were all in a repair shop at the time of the show and tell. I failed to show and tell because after the "show" I asserted my right to legal counsel. However, I offered to produce the above items to the Article 32 Investigating Officer. As you can see from Defense Exhibit DD, I told the inspectors my stereo was in the shop. The Sanyo tuner and cassette deck were also in the repair shop.
>
> Also, at the time of the inspection my wife was in possession of her watch also listed in Specification 1 of Charge I [the appellant's wife was not home at the time]. You can see from Defense Exhibit CC [sic], I told the inspector where it was and offered to produce it for the Article 32 Investigating Officer.

---

[5] The Court of Military Appeals decision in *United States v. Lee*, 25 M.J. 457 (C.M.A. 1988) was released on 2 March 1988, over a year before this case was tried. *But see United States v. Hilton*, 27 M.J. 323 (C.M.A. 1989).

> Lastly, the Toshiba cassette recorder listed in Specification 1 of Charge I was at work [at his office] at the time of the inspection. I also offered to produce this item for the Article 32 Investigating Officer. The only item in Specification 1 of Charge I improperly disposed of was the 4 times I told you about in my guilty plea.[6]

This is precisely what the appellant told the military judge, under oath, during the providence inquiry.[7] The providence inquiry itself also reveals that the appellant did not offer to take the analysts to the repair shop or his office where the stereo equipment was located, *nor did the analysts ask that he do so.* Regarding the watch, the appellant's wife was somewhere on base at the time, but the appellant was not sure where. At one point the military judge said: "You can bring it [the watch] in here if I wanted to see it?" The appellant replied: "Yes, sir."

We also find of interest a matter which arose during trial counsel's argument on sentence.

> ATC: However, at the time that the Merchandise Control representative was asking him [the appellant] to account for this property he couldn't show any receipts. He had no receipts to show that they were, indeed, in the shop—
>
> DC: Objection. It's [sic] not in evidence. There was no request made to produce receipts at the time.
>
> MJ: Got a point there, doesn't he?
> ATC: He was unable to show proper disposition.
>
> MJ: Okay. But, you can't show that he offered or was asked about receipts. I'll sustain the defense on that. Go ahead.

---

[6] The Article 32 Investigating Officer's report confirms that the offer to produce this property was made.

[7] We recognize that what the Government might have been able to prove *vis-a-vis* what the appellate related to the military judge could vary. However, when assessing the validity of a guilty plea, it's an accused's version of the events that counts.

Neither the extracts from USCINCPACREPPHIL-INST 4066.7R introduced at trial in this case, nor the provisions of Clark Air Base Regulation 30-3, *Merchandise Control* (24 January 1986), of which we took judicial notice in our most recent opinion in the *Hilton* case (see the Appendix to that opinion), and again do so, contain any requirement that U.S. Forces members in the Republic of the Philippines maintain documentation showing that items of controlled property are in a repair shop. Nor is there any regulatory prohibition against placing items of controlled property in a repair shop or keeping them at a work center.

The appellant is charged with "wrongfully failing to show *possession* or *authorized disposition*" of the property in question. (Emphasis added.) The record before us indicates that the appellant had constructive possession of the stereo equipment, and that there was no unauthorized disposition. We hold that there is no violation of the accounting provision of the regulation charged under the circumstances present in this case as far as the stereo equipment is concerned. There is simply no criminal *mens rea* established. The same can be said for the lady's watch. To attempt to hold a servicemember criminally liable for failing to account for a piece of property when he says the property is in the possession of one of his dependents who does not happen to be physically present at the time the accounting is requested we find astonishing. With regard to these items of property the findings of guilty cannot stand. R.C.M. 910(e) and Discussion, and 910(h)(2).* We will take appropriate corrective action in our decretal paragraph. Once the appellant volunteered information as to the location of these items of property in response to the initial request for accounting, had the merchandise control officials asked the appel-

* We recognize that the parties at trial may have been constrained to some degree by virtue of the existence of a pretrial agreement in this case.

lant to accompany them to the repair shop and the place where he worked so they could independently verify the existence of the stereo equipment, and the appellant refused to do so, we would reach a different conclusion. *But see* 29 M.J. at 115, n.2. With regard to the watch, the officials should have made arangements to subsequently meet with Mrs. Smalls to verify possession of that item. If she could not show possession or authorized disposition, then a regulatory violation would have occurred.

II

We find no merit in the appellant's contention that the military judge was improperly predisposed to adjudge a punitive discharge. At trial, the government took the position that 18 U.S.C. § 1544 (misuse of passport) had extraterritorial application. *See generally United States v. Mosley*, 14 M.J. 852 (A.C.M.R. 1982); *United States v. Johnson*, 735 F.2d 373 (9th Cir. 1984); *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968). In so ruling, the military judge stated:

> Well, I've considered those cases and I would find that the court does have jurisdiction over the person of the accused before us. I think this is an offense, pretty clearly, that has extraterritorial effect and that one federal case, I think, really lays that out. *Of course, if some appellate court disagrees, that will be up to them to say so.*

(Emphasis added.) It is urged that this "Freudian slip" revealed that the military judge intended all along to adjudge a punitive discharge in order to insure this case would be reviewable by an appellate court. We view this more as a remark about the state of the law regarding the jurisdictional issue before him; a reference to appellate courts in general, not necessarily one that might be required to review this particular case. And as appellate government counsel aptly point out: "The comment now raised as a bases [sic] for error prompted no response at

trial." *See United States v. Small*, 21 M.J. 218 (C.M.A. 1986). From our review of the record we conclude that the military judge acted fairly and impartially throughout the trial. *United States v. Berman*, 28 M.J. 615, 617-618 (A.F.C.M.R. 1989); *United States v. Martinez*, 19 M.J. 652 (A.C.M.R. 1986). *See generally* R.C.M. 801, 902; American Bar Association, *Code of Judicial Conduct*, Canon 3.

In the interest of judicial economy, we will resolve the error noted above at this level of review. Only so much of the findings of guilty of Specification 1 of Charge I as finds that the appellant violated the regulation set forth by failing to show possession or authorized disposition of four tires is affirmed. Reassessing the sentence based on this modification, as well as our independent review of the entire record, we find appropriate only so much thereof as provides for a dishonorable discharge, confinement for three months, forfeiture of $200.00 pay per month for three months, and reduction to airman basic (E-1). Article 66(c), UCMJ, 10 U.S.C. § 866(c). Accordingly, the findings of guilty and the sentence, both as modified, are

AFFIRMED.

Senior Judge KASTL and Judge MURDOCK concur.

APPENDIX C

[DOD LOGO]

DEPARTMENT OF THE NAVY
COMMANDER U.S. FACILITY SUBIC BAY
COMMANDER, U.S. NAVAL FORCES PHILIPPINES
Representative of the Commander in Chief
U.S. Pacific Command in the Philippines
FPO San Francisco 96651-0051

USCINCPACREPHILINST 4066.7R
007

4 Apr. 1986

USCINCPAC REP PHIL INSTRUCTION 4066.7R

Subj: GENERAL MERCHANDISE CONTROL REGULATIONS IN THE REPUBLIC OF THE PHILIPPINES

Ref: (a) Philippines-U.S. Military Bases Agreement of 1947, as amended
(b) American Embassy Note 546 of 11 Feb 1965
(c) RP Department of Foreign Affairs Note 4617 of 7 Mar 1966
(d) RP Department of Foreign Affairs Note 1397-58 of 15 May 1958
(e) RP Office of the Chief of Staff ltr of 19 Oct 1977
(f) Deputy Minister of Finance, Republic of the Philippines ltr of 20 Oct 1981
(g) USCINCPACREPPHILINST 5840.2B
(h) Joint Travel Regulations, Vols I and II
(i) Deputy Minister of Finance, Republic of the Philippines ltr of 6 Nov 1985

Encl: (1) Exchange and Commissary Privileges and Purchase Limitations
(2) Purchase of Controlled Items
(3) Information on Retiree Store Outlets, List of Items and Authorized Quantities Approved for Sale

(4) Acquisition, Possession and Disposition of Personal Property
(5) Acquisition, Possession and Disposition of Motor Vehicles
(6) Prohibited Acts and Practices
(7) Duty-Free Entry into or Retention within the Republic of the Philippines of personal property belonging to certain categories of U.S. Armed Forces Personnel
(8) Listing of PHILGEN Forms for Use by Merchandise Control Offices

PRIVACY ACT STATEMENT

This regulation defines authorized and prohibited conduct with respect to tax-exempt merchandise. It is applicable to, and binding upon, all active duty, reserve, and retired military personnel; civilian employees of the United States Government; U.S. national contractor personnel; technical representatives, as approved by the cognizant commander; and dependents accompanying military or civilian personnel assigned or attached, or in a transient status, at U.S. installations or facilities within the Republic of the Philippines. Violation of this regulation may result in disciplinary action under the provisions of the Uniform Code of Military Justice, the Federal Personnel Manual, and appropriate administrative actions, including but not limited to, revocation of tax-free purchase privileges and revocation of area entry approval. This regulation is affected by the Privacy Act of 1974 and the information requested herein is solicited under the authority of PL 78-380, 58 Stat 626, as implemented by the agreement between the United States of America and the Republic of the Philippines concerning military bases, 14 March 1947, as amended.

1. *Purpose.* To promulgate merchandise control policy to fulfill the spirit, intent, and letter of United States Government agreements with the Government of the Republic of the Philippines.

2. *Cancellation.* CINCPACREPPHILINST 4066.7Q

3. *Scope.* This instruction covers the acquisition of personal property, privately owned vehicles, and merchandise, which is introduced into the Republic of the Philippines (RP) without payment of RP taxes and duty; its possession and disposition by tax-exempt U.S. personnel; establishes and delineates certain requirements and prohibitions; and prescribes forms for implementation of the Merchandise Control program. Merchandise includes, but is not limited to, food, liquors, cigarettes, petroleum products, household effects, and motor vehicles. As of 1 January 1978, there is a RP ban on sales of tax-exempt merchandise to nontax-exempt persons. Violation of this regulation and enclosures, or related or implementing instructions and regulations, by persons subject to the Uniform Code of Military Justice (UCMJ) is punishable under the UCMJ, in addition to subjecting the violator to appropriate administrative measures. Appropriate administrative action will also be taken with respect to violations by persons not subject to the UCMJ. Civilian employees who violate merchandise control regulations are subject to disciplinary and administrative action in accordance with appropriate regulations.

4. *Background.* Reference (a) and subsequent exchanges of notes between the Governments of the United States and the RP constitute the basic legal authority for the establishment and maintenance of the U.S. military bases in the RP, including the control of all tax-free goods brought into the bases. Reference (a) provides in part that:

Article V

"No import, excise, consumption, or other tax, duty, or impost shall be charged on material, equipment, supplies, or goods, including food stores and clothing, for the exclusive use in the construction, maintenance, operation, or defense of the bases, consigned to, or destined for, the United States authorities and certified by them to be for such purposes."

Article XI

"1. It is mutually agreed that the United States shall have the right to bring into the Philippines members of the United States military forces and the United States nationals employed or under a contract with the United States together with their families, and technical personnel of other nationalities (not being persons excluded by the laws of the Philippines) in connection with the construction, maintenance, or operation of the bases . . .

2. If the status of any person within the Philippines and admitted thereto under the foregoing paragraph shall be altered so that he would no longer be entitled to such admission, the United States shall notify the Philippines and shall, if such person be required to leave the Philippines by the latter Government, be responsible for providing him with a passage from the Philippines within a reasonable time, and shall in the meantime prevent his becoming a public responsibility of the Philippines."

* * * *

in company with their sponsors. A depedent whose Privilege Card is overstamped with a "V" will not be authorized a cigarette, liquor, or wine ration.

f. Personnel (sponsor and dependents) who have had their Privilege Card suspended/revoked are prohibited from entering the commissary, exchange, convenience outlets, and other retail outlets (Loot Locker, Mad Money Mart, etc.) during the period of suspension/revocation. Prompt disciplinary/administrative action shall be taken against violators.

g. Privilege Cards issued to personnel identified in subparagraphs 5b, c, and d who are implicated in serious merchandise control violations will be confiscated and the privilege to purchase tax-free merchandise may be permanently revoked.

h. Sponsors are responsible for merchandise control violations committed by their dependents. Accordingly,

when the sponsor becomes aware of a dependent's possible violation of this instruction or when the sponsor and dependent(s) establish separate households, it is the responsibility of the sponsor to notify the cognizant Merchandise Control Officer and to request termination or limitation, as appropriate, of the dependent(s) tax-free purchase privileges. In cases of separation, the sponsor is also responsible to ensure that all controlled items are disposed of in accordance with this instruction.

7. *Supervisory Control Authorities.* Commander, U.S. Naval Forces, Philippines, and Commander Thirteenth Air Force are hereby designated Supervisory Merchandise Control Authorities and are authorized to direct additional controls, including implementing instructions, in addition to those prescribed herein, as required by local conditions in their areas of responsibility to preclude access to and acquisition of tax-exempt goods by nontax-exempt persons. They shall ensure that the provisions of this instruction are enforced in a similar manner to all applicable personnel regardless of rate, rank, position, or status.

8. *Merchandise Control Activity (MCA)*

a. A Merchandise Control Activity is the command or agency designated to establish and administer merchandise controls promulgated by this instruction and by the appropriate Supervisory Control Authority. The following are hereby designated Merchandise Control Activities:

(1) *Commander 3rd Combat Support Group, Clark Air Base*: To include all units and personnel in the areas of Clark Air Base, Wallace Air Station, Camp O'Donnell, John Hay Air Station, and the U.S. Naval Communications Transmitter Facility, Capas.

(2) *Commanding Officer, U. S. Naval Station, Subic Bay.* To include all units and personnel in the Subic Bay Naval Base complex and the U.S. Naval Communication Station Philippines, San Miguel, and all DOD units and

personnel, except Defense Attache and JUSMAG PHIL personnel, in the greater Manila area.

b. Commanders of Merchandise Control Activities may, upon written application, grant exceptions in unusual circumstances to specific provisions of this instruction when considered in the best interest of the U.S. Government and provided the exceptions are in accordance with pertinent service directives and references (a), (b), and (c).

9. *Merchandise Control Officer (MCO).* Each designated Merchandise Control Activity, as listed in paragraph 8a, will appoint a MCO who will administer and supervise merchandise control procedures and insure compliance with this and related instructions. Subject to the direction of the applicable Supervisory Control Authority, the MCO will:

a. Establish and maintain auditable records of patron acquisitions of tax- or duty-free items, as listed in paragraph 1a of enclosure (2), from any source and of their disposition by sale or other means in the RP.

b. Coordinate with other Merchandise Control Activities, as appropriate, to insure maximum standardization of area merchandise control records, forms, Privilege Cards, and procedures.

c. Record, control, and cause to be investigated, when appropriate, all transactions and tax-free possessions of personnel under the cognizance of the Merchandise Control Activity.

d. Issue and control the possession and use of Privilege Cards and other types of purchase authorizations.

e. Utilize U.S. citizen personnel to the maximum extent possible in positions which involve supervision and review of merchandise control records.

f. Maintain close liaison with the commanding officers or persons in charge of tenant and component activities; insure that merchandise control regulations are promul-

gated in such activities; and promptly report all known or suspected violations to such commanding officers or persons in charge.

g. Submit additional reports and recommendations when required by higher authority or when deemed appropriate.

10. *Merchandise Control Representatives.* Merchandise Control Sub-Offices may be operated at locations as approved by the MCA and shall be administered by Merchandise Control representatives under the operational control of the Merchandise Control Officer.

11. *Exchange, Commissary, and Recreation Services Officers/Morale, Welfare, Recreation (MWR) Officers.* All Exchanges, Commissary Store, and Recreation Services/MWR Officers will:

a. Cooperate with and assist the MCO in the supervision of merchandise control procedures.

b. Insure compliance with this instruction and other related instructions.

c. Subject to procedures directed by the Supervisory Control Authority:

(1) Report to the appropriate Merchandise Control Activity any

* * * *

PROHIBITED ACTS AND PRACTICES

1. *Definitions.* The terms "tax-exempt property" and "tax-exempt motor vehicles," as used herein, refer to personal property or motor vehicles in the RP upon which no RP import, excise, consumption, or other tax, duty, or import has been paid by reason of the exemption granted pursuant to reference (a). A "nontax-exempt person" is a person or other entity not entitled to a tax exemption under reference (a). All prohibitions relating to motor vehicles are equally applicable to the major components

of motor vehicles, i.e., engine, transmission, drive train, and chassis.

2. *Tax-Exempt Personal Property.* The following acts and practices relating to the acquisition, possession, and disposition of tax-exempt personal property are *prohibited* and violations may result in disciplinary and/or adverse administrative actions:

a. Sale, transfer, exchange, trade, or other disposition of tax-exempt property to nontax-exempt persons in the RP other than as provided for by paragraph 2g of this enclosure.

b. Importation into or purchase in the RP of tax-exempt property:

(1) In quantities which exceed reasonable anticipated personal needs;

(2) Primarily for the purpose of sale, exchange, barter, or disposition to any person or entity; or

(3) Primarily for the use of nontax-exempt persons.

c. The purchase of "controlled items" listed in enclosure (2) in excess of the quantities set forth herein.

d. The purchase of cigarettes, liquor, and/or wine in excess of quantities authorized for purchase by enclosure (1) of this instruction.

e. The purchase of tax-free merchandise from exchange, commissary, and other retail outlets in excess of the monetary purchase limits established by enclosure (1) of this instruction.

f. The loan, mortgage, bailment, assignment, or other similar transfer of tax-exempt property which permits actual use or possession of such tax-exempt property by a nontax-exempt person even though the legal title remains in a tax-exempt transferor.

g. The gift of tax-exempt property to nontax-exempt persons, except that the occasional gift of an item or group of items other than food, tobacco products, alcoholic beverages, petroleum products, U.S. military uniform items, and controlled items (listed in enclosure (2)), which do not exceed a value of $15.00 in the aggregate, is permitted. Gifts of food, tobacco products, alcoholic beverages, petroleum products, U.S. military uniform items, and controlled items are prohibited regardless of value. However, reasonable quantities of homebaked confections qualify as bonafide gifts.

h. Possession or maintenance of tax-exempt personal property in an off-base residence other than the housing noted in the records of the cognizant Merchandise Control Activity.

i. Exiting a base or attempting to exit a base with tax-exempt property without displaying properly issued property passes or merchandise control documents, or concealing or attempting to conceal tax-exempt property when exiting the base.

j. Use of exchanges and commissaries except as authorized in enclosure (1).

k. Possession or use, or attempted use, of the Privilege Card of another, of a false Privilege Card, or of a facsimile of a Privilege Card, with or without an intent to deceive.

l. Use of any Privilege Card, or facsimile thereof, for any purpose other than its intended purpose as set forth in this instruction.

m. The use of a power of attorney to dispose of tax-exempt property, except in cases of hospitalization or hardship, when prior written approval has not been obtained from the cognizant MCA.

n. The sale of controlled items, as identified in enclosure (2), to any person other than by completing the

transaction at the cognizant Merchandise Control Activity.

o. The attempt by an individual or the conspiracy of individuals to commit any of the prohibited acts or practices listed in this enclosure.

p. Uttering or submitting to the cognizant MCO a false report of loss, theft, destruction, or other disposition of personal property.

q. Failure to obtain clearance from the cognizant MCO prior to completion of duty in the RP.

r. Failure to show possession or authorized disposition of tax-exempt personal property when so directed by cognizant authorities.

s. Failure to report to the cognizant Merchandise Control Officer no later than 30 days prior to PCS departure for purposes detailed in paragraph b.i. of this instruction.

3. *Tax-Exempt Motor Vehicles.* The following acts and practices relating to the acquisition, possession, and disposition of motor vehicle are *prohibited*:

a. Disposal or sale of tax-exempt motor vehicles without prior written approval of the cognizant MCA.

b. The sale of tax-exempt motor vehicles other than by completing the transaction, including the execution and transfer of documents evidencing title or ownership and acceptance of consideration, at the cognizant Merchandise Control Activity.

c. The sale of tax-exempt motor vehicle other than in accordance with enclosure (5) of this instruction.

d. The loan, mortgage, bailment, assignment, or similar transfers of a tax-exempt motor vehicle which permits actual use or possession of such exempt motor vehicle by a nontax-exempt person even though the legal title remains in a tax-exempt transferor.

e. The use of a power of attorney to enable a person to dispose of a motor vehicle through an agent, except in

cases of hospitalization or hardship as determined to exist by the MCO.

f. Importation into or purchase in the RP of tax-exempt motor vehicles primarily for the purpose of sale, exchange, barter, or disposition to any person or entity, or for any purpose other than to meet reasonable anticipated needs of the owner.

g. Uttering or submitting to the cognizant MCO a false report of loss, theft, destruction, or other disposition of a motor vehicle.

h. Failure to show possession or authorized disposition of tax-exempt motor vehicles when so directed by cognizant authorities.

i. The importation, or attempted importation, of more than one tax exempt motor vehicle into the RP except as authorized by this instruction.

4. *Sales of tax-paid personal property and motor vehicles originally imported by the owner pursuant to PCS orders or other similar authority.* Personal property and/or motor vehicles imported into the RP by Philippine citizen members of the U.S. military and which require payment of full Philippine taxes/duties may be sold to non tax-exempt personnel only within 3 months of the member's PCS departure from the RP. The sale must be approved by the cognizant MCO with the Deed of Sale accomplished by the MCO. The tax-paid personal property and/or motor vehicle must remain in the possession of the military member or his authorized dependents prior to the approved sale of the items.

5. Personnel (sponsor and dependents) who have had their Privilege Card suspended revoked are prohibited from entering the commissary, exchange, convenience outlets, and other resale outlets (Loot Locker, Mad Money Mart, etc.) during the period of suspension/revocation.

* * * *

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Supreme Court, U.S.
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No. 91-437

In the Supreme Court of the United States

OCTOBER TERM, 1991

TYRONE M. SMALLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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QUESTION PRESENTED

Whether prosecuting petitioner for failing to obey an Air Force regulation that required him, under penalty of criminal prosecution, to produce proof of possession or lawful disposition of certain tax-exempt items when requested to do so by appropriate military authorities, violated his Fifth Amendment privilege against compelled self-incrimination.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-437

TYRONE M. SMALLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-6a, is reported at 32 M.J. 398. The opinion of the Air Force Court of Military Review, Pet. App. 7a-17a, is reported at 30 M.J. 666.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 21, 1991. The petition for a writ of certiorari was filed on September 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

1. By agreement with the United States, the Republic of the Philippines permits United States servicemembers stationed there to import various goods from abroad without paying local taxes and customs duties. USCINCPACREPPHILINST 4066.7Q, General Merchandise Control Regulations of the Republic of the Philippines, Privacy Act Statement ¶ 4 (Background), Pet. App. 20a-21a [hereinafter GMCR]; see GMCR Privacy Act Statement ¶ 1 (Statement of Purpose), Pet. App. 19a. Tax-exempt goods are for the use of United States servicemembers only; they may not be resold to Filipinos, as such sales would deprive the Philippine government of income from import duties. GMCR Prohibited Acts and Practices ¶ 2a, Pet. App. 25a; *United States* v. *Hilton*, 29 M.J. 1036, 1041 (A.F.C.M.R.), aff'd, 30 M.J. 118 (C.M.A. 1990). The agreement between the United States and the Republic of the Philippines imposes on the United States an affirmative duty to ensure that tax-exempt goods are not resold to Filipinos on the black market. *Ibid.* (quoting U.S. Military Base Agreement with the Republic of the Philippines, Art. XVIII).

The incentive for the development of a black market in tax-exempt goods is quite strong. Customs duties in the Philippines can double the cost of some goods, such as automobiles. See *Hilton*, 29 M.J. at 1042. As a result, Filipinos can save a substantial amount of money by buying—and United States servicemembers can make a handsome profit by selling—tax-exempt goods on the black market.

To comply with its agreement to prevent the development of a black market, the United States Air Force adopted regulations prohibiting servicemembers from disposing of tax-free goods to individu-

als who are not servicemembers. GMCR Prohibited Acts and Practices ¶ 2a, Pet. App. 25a; see *Hilton*, 29 M.J. at 1043-1044. Servicemembers are also required to "show possession or authorized disposition of" tax-exempt property when directed to do so by military authorities. GMCR Prohibited Acts and Practices ¶¶ 2r, 3h, Pet. App. 27a, 28a. Aware that this latter requirement could raise Fifth Amendment concerns, military courts have held that the regulations require production of the tax-free item or documentation showing *lawful* disposition, *United States* v. *Williams*, 29 M.J. 112, 115 (C.M.A. 1989), but that they may not be used to compel testimony that would incriminate the individual, *United States* v. *Lee*, 25 M.J. 457 (C.M.A. 1988).

2. Petitioner is a member of the United States Air Force stationed at Clark Air Base, in the Philippines. He purchased a tax-exempt Chevrolet Blazer and a tax-exempt Toyota Celica, but he failed to register either of them at the base. A merchandise control officer, noting petitioner's failure to register the cars, asked petitioner to show possession or authorized disposition of his tax-exempt items. The officer did not ask petitioner to admit that he made an unauthorized transfer of the cars, nor did he ask petitioner to admit having ever owned or possessed them. In response to the inquiry, petitioner failed to produce the tax-exempt items or proof of their lawful disposition. PX 1. When petitioner requested counsel, the inquiry was terminated.

3. Petitioner was charged with violating two provisions of the GMCR by failing to show possession or authorized disposition of tax-exempt personal property, namely four car tires and two cars. GMCR Prohibited Acts and Practices ¶¶ 2r, 3h, Pet. App. 27a, 28a. He pleaded guilty. He admitted that he had failed

to show possession or authorized disposition, because he had sold the tires and cars illegally. Tr. 34-35, 38-40. In fact, it appears that petitioner purchased both cars solely for the purpose of selling them illegally, since he never took possession of either one. Tr. 38-44.

During the detailed guilty plea inquiry required in the military system,[1] petitioner said he was satisfied with the advice of both of his attorneys. Tr. 13-14. Petitioner also acknowledged orally and in writing that he considered his attorneys competent, that they had discussed potential defenses that might apply, and that it was petitioner's decision to plead guilty. Tr. 53-54; AX 5. Petitioner did not assert a violation of his Fifth Amendment privilege against compelled self-incrimination.

4. On appeal to the Air Force Court of Military Review, petitioner argued that his pleas of guilty were involuntary because the trial judge did not advise him that he had a possible defense based on his privilege against compelled ~~against~~ self-incrimination. The court of military review upheld the conviction, with a slight modification. Pet. App. 7a-17a. The Court of Military Appeals granted discretionary review and affirmed. Pet. App. 1a-6a.

ARGUMENT

Petitioner failed to raise a legal challenge to his conviction before the court-martial, and instead entered his guilty plea. Now, however, he asks this

[1] See *United States* v. *Care*, 40 C.M.R. 247 (C.M.A. 1969) (when a military accused desires to plead guilty, the trial judge must explain the elements of the offense(s) to the accused, ask questions to be convinced the accused is guilty, and advise the accused of the various rights he forfeits by his plea, such that his plea is knowing, intelligent, and conscious).

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Court to reverse his conviction on the ground that it is inconsistent with the Fifth Amendment. Because petitioner did not properly raise the claim below and because the regulation is constitutional in any case, review by this Court is unwarranted.

1. In *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), this Court stated:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Because petitioner failed to raise the claimed deprivation of his Fifth Amendment rights before pleading guilty, *Tollett* forecloses his challenge to his conviction. Cf. *McMann* v. *Richardson*, 397 U.S. 759 (1970) (guilty plea constitutes a waiver of the claim that the government extorted a confession from the defendant, in violation of the Fifth Amendment).

Relying on *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *Menna* v. *New York*, 423 U.S. 61 (1975), petitioner asserts that his challenge is not barred because it goes to the very power of the government to bring him into court. Specifically, petitioner maintains that the offense to which he pleaded guilty is not an offense at all. It is by no means clear, however, that the claim petitioner now seeks to raise is one that challenges the authority of the government to bring him to trial. His claim is simply that the regulations at issue required him to incriminate himself, which is not necessarily different from the claim that a law enforcement officer forced petitioner to incriminate himself under a different regulation. In either case, petitioner's challenge is not to the govern-

ment's authority to try him, but is to the government's use of legal or extra-legal authority to wring incriminating evidence from him. That type of claim is one that is waived through a guilty plea. *McMann* v. *Richardson*, *supra*. In any event, the regulation at issue in this case is constitutional.

2. It is well established that the government may require the keeping of records that may be inspected and used in prosecuting statutory violations committed by the recordkeeper himself. *Shapiro* v. *United States*, 335 U.S. 1, 32-33 (1948); *Davis* v. *United States*, 328 U.S. 582, 589-590 (1946). As this Court has explained, the Fifth Amendment privilege may not be asserted "in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'" *Shapiro*, 335 U.S. at 33 (quoting *Davis*, 328 U.S. at 589-590). That settled principle controls this case.

a. To comply with its treaty obligations with the Republic of the Philippines, the United States Air Force prohibits the sale of tax-exempt items to persons who are not servicemembers. The pertinent regulation requires servicemembers to show, on demand from an appropriate authority, "possession or authorized disposition of" tax-exempt property. GMCR Prohibited Acts and Practices ¶¶ 2r, 3h, Pet. App. 27a, 28a. It cannot be claimed that the restrictions on sales of tax-exempt goods are not "validly established," *Shapiro*, 335 U.S. at 33; the Air Force has a weighty and legitimate interest in upholding its treaty obligations by prohibiting its members from black-marketing tax-exempt goods. Nor can it be asserted that the transactions are not "the appropriate subjects of governmental regulation." *Ibid.* The

Air Force may legitimately enforce its restrictions by requiring servicemembers to maintain records of transactions conducted in tax-exempt goods. Petitioner does not contend otherwise. Instead, petitioner claims that the regulation is not a recordkeeping requirement at all because it does not require him "to keep any records." Pet. 6-7.

As the Court of Military Appeals explained in *United States* v. *Williams*, 29 M.J. at 115, the Air Force regulations require the possession of the item or "some type of documentation or other papers showing lawful disposition." See *Hilton*, 29 M.J. at 1049 (quoting *Williams*). Indeed, military officials are permitted to request production of *only* the item or documents reflecting its disposition: "Different questions or additional questions in combination with the original request to produce the item or documentation are not authorized." *Williams*, 29 M.J. at 115 & n.2; *Hilton*, 29 M.J. at 1048-1049. Clearly, the requested "documents" or "papers" are required records.

There is no force to petitioner's suggestion that the regulation cannot be a record-keeping requirement since it does not prescribe the use of a particular form. Of course, the Air Force could have prescribed a specific form, but the Air Force was also free to permit servicemembers to retain the required information in the manner they found most convenient. A regulation requiring persons to maintain bona fide documentation does not cease to be a recordkeeping requirement simply because it does not dictate the precise manner in which the information is to be recorded or maintained.[2]

[2] Petitioner also attempts to characterize the regulation as requiring testimony rather than documents by referring to the regulation as a "show and tell" requirement. See Pet. 4-9. But

b. Petitioner challenges the recordkeeping requirement by invoking the exception enunciated in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965), and *Marchetti* v. *United States*, 390 U.S. 39 (1968). Pet. 6-8. In *Albertson* and *Marchetti* this Court held various registration requirements unconstitutional on the ground that they had a direct tendency to incriminate the registrants and were directed at a "selective group inherently suspect of criminal activities." *Albertson*, 382 U.S. at 79; *Marchetti*, 390 U.S. at 57. By contrast, in this case the disclosure requirement is directed at all military servicemembers—active duty, reserve, retired, their dependents, and civilian employees—if they purchase tax-free items in the Philippines. Such persons do not constitute an inherently suspect group; on the contrary, the group includes virtually all military personnel stationed in the Philippines.

In *Albertson* the government demanded admissions that the individuals were members of the Communist Party at a time when such membership was arguably criminal. 382 U.S. at 77. And in *Marchetti* the government demanded registration of the defendant's wagering business when wagering was illegal. 390 U.S. at 48-49. Because those laws required disclosure of illegal conduct, the individuals could not comply with the registration requirements without incriminating themselves. The recordkeeping requirement in this

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that characteristization is misleading. The regulation does not require the servicemember to "tell" anything; it requires only that the servicemember "show" the item or authorized disposition. GMCR Prohibited Acts and Practices ¶¶ 2r, 3h, Pet. App. 27a, 28a. The military courts have held that the regulation extends to documents and papers showing authorized disposition only; it does not authorize military officials to ask anything more. *Williams*, 29 M.J. at 115; *Hilton*, 29 M.J. at 1046.

case, by contrast, did not compel anyone to incriminate himself.

GMCR Prohibited Acts and Practices ¶ 2r requires the servicemember to show one of two things: "possession" of the tax-exempt item, or "authorized disposition" of it. Neither is incriminating. If the servicemember shows "possession" as required, he has not incriminated himself, because possession is legal. Nor has he incriminated himself if he shows "authorized disposition," since an authorized disposition is also legal.

Petitioner's assertion that he could be "prosecuted * * * for refusing to answer questions as to the location of th[e] items," Pet. 5, stems from a misreading of the regulations. The text of the regulations requires only proof of possession or authorized disposition: it does not require the individual to give the location of the item. In fact, as the Court of Military Appeals has explained, the regulation does not permit the suspect to be questioned about the whereabouts of the item. See *Williams*, 29 M.J. at 115 & n.2 ("Different questions or additional questions in combination with the original request to produce the item or documentation are not authorized."); *Hilton*, 29 M.J. at 1048-1049.

Petitioner's situation is conceptually no different from that of a motorist who is asked to produce, under threat of legal sanction, proof that his car is properly registered. Such a request does not violate the Fifth Amendment, for proof of registration does not tend to incriminate the motorist. The case here presents the same analysis. GMCR Prohibited Acts and Practices paragraphs 2r and 2h do not compel servicemembers to admit they have illegally disposed of property; it only requires them to show *lawful* possession or *authorized* disposition. It was for failing to make that

showing, not for failing to incriminate himself, that petitioner was prosecuted.

3. Even if the regulation were not a recordkeeping requirement, it still would not violate the Fifth Amendment. As this Court explained in *Baltimore City Dep't of Social Servs.* v. *Bouknight*, 493 U.S. 549, 558 (1990), "[w]hen a person assumes control over items that are the legitimate object of the government's non-criminal regulatory powers, the ability to invoke the privilege is reduced." Tax-exempt items are certainly a legitimate object of governmental regulation. Pursuant to its treaty obligations with the Republic of the Philippines, the Air Force must regulate the transfer of such items. To that end, the Air Force has promulgated regulations that permit servicemembers to purchase certain merchandise introduced into the Philippines without the payment of taxes, provided they comply with certain requirements and conditions enumerated in the regulations. Pet. App. 20a. One of the conditions is that the servicemember be willing to show possession or authorized disposition of the item when directed to do so by appropriate military authorities. Pet. App. 27a, 28a.

Nothing requires servicemembers to subject themselves to the regulation; they are free to avoid the regulation by not purchasing tax-exempt items. But, in the words of the Air Force Court of Military Review, "[i]f [they] want to play the game, [they] have to comply with its rules." *Hilton*, 29 M.J. at 1046. By purchasing the tax-exempt items, petitioner "submitted to the routine operation of the regulatory interests and agreed" to maintain the items or proof of disposition "in a manner consonant with the * * * regulatory system and subject to inspection," *Bouknight*, 493 U.S. at 558.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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